IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.569 OF 2001

IN

SUIT NO.3433 OF 1997

...

S.S.Jhuria & ors. ...Appellants

v/s.

Union of India & ors. ...Respondents

...

Mr.H.J.Thakkar, Sr.Counsel i/b Bhai Shankar Kanga & Girdharlal for the Appellants.

Mr.S.R.Rajguru for the Respondents Nos.1 to 3.

Mr.K.R.Bulchandani i/b Zohair & co. for Respondent No.4.

Mr.S.N.Shah with Mr.L.S.Jain for Respondent No.5.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 24TH OCTOBER, 2007

P.C.:

1. By this Appeal the Appellants who are original Plaintiffs challenge the judgment and order dated 30th March, 2001 passed by the learned single Judge of this Court in Suit No.3433 of 1997. By that judgment the learned single Judge has decided only the preliminary issue and has disposed of the suit.

. At the outset, the learned Counsel appearing for the Appellants stated before us that the Appellants do not claim any reliefs against Defendants Nos.1,2 & 3 and they sought leave of the court to delete allegations made against Defendants Nos.1, 2 & 3 as also prayers by which reliefs are claimed by the Plaintiffs against Defendants Nos.1, 2 & 3.

2. According to the averments in the plaint, the

Plaintiffs are the trustees and beneficiaries under a Declaration of Trust dated 1st April 1951 made by one Kanhaiyalal J. Poddar, who was the grandfather of the Plaintiffs Nos. 1 & 2 and the Defendant No.4 and he was also a great grandfather of Plaintiff No.3. Plaintiff No.3 was appointed as a trustee of the said trust by registered Deed of Appointment dated 10-4-1996. Defendant No.5 is the wife of the Defendant No.4. Defendant No.1 is the Union of India and Defendants Nos. 2 & 3 are the officers of the Union of India. According to plaint, by declaration of Trust dated 1st April, 1951 executed by the said Mr.Kanhaiyalal J. Poddar an amount of Rs.2 lakh was declared as a Trust Fund for the benefits of the members of the family of the son of the said Mr.Kanhaiyalal J. Poddar. The name of the son was Ram Niwas K. Poddar. The said Kanhaiyalal Poddar appointed himself as the trustee of the said trust. One Ajay Singh Randhir Singh was appointed as additional trustee of the Trust by Kanhaiyalal J. Poddar. One Deviprasad Khandelwal had by an agreement dated 2-7-1942 acquired the right to grant of lease by Bombay Municipal Corporation of a plot of land being plot No.6, Worli Estate, Scheme No.52 at Abdul Gaffar Khan Road, Worli, Bombay for a period of

999 years. The said Deviprasad Khandelwal entered into an agreement dated 29-2-1956 agreeing to transfer and convey all his rights under that agreement in favour of one of the trustees of the trust by name Mr.Ajaysingh Randhir Singh. On payment of full consideration to the said Khandelwal, he executed irrecoverable power of attorney in favour of Mr.Ajaysingh Randhir Singh and Mr.Ramniwas K. Poddar. The Bombay Municipal Corporation executed the Indenture of Lease dated 19-2-1964 with the said Mr.Ajaysingh Randhirsingh as confirming party of the said land with structure thereon in favour of one Smt.Shantidevi S. Juria, the Plaintiff No.1, Smt.Shakuntala Devi S. Kayal, Plaintiff No.2, Shri D.R.Poddar, Defendant No.4 and Smt.Uma D. Poddar, Defendant No.5. The said lease was for a period of 999 years from 14th July, 1942. The consideration for the lease i.e. Rs.25,000/- was paid from the Trust Fund of Rs.2,00,000/-. According to the Plaintiffs, before the lease of the land was granted by the Corporation in the year 1964, Mr.Ramniwas Poddar had appointed four persons, in whose favour the lease was executed, as trustees of the said Trust. Defendants Nos. 4 & 5, however, declined to act as Trustees. They also disowned their signatures

on the lease deed. According to the Plaintiffs, the aforesaid land and the structure thereon is the property of the Trust of which they are the trustees. The title of the Trust to the property, according to the Plaintiffs, was disputed by Defendants Nos.4 & 5, and therefore, Defendants Nos.4 & 5 were joined as parties. According to the Plaintiffs, the authorities to the Income-tax Department were also treating the property as belonging to the said Poddars and not to the trust and therefore, these authorities were also joined as parties.

3. The principal relief claimed in the suit was a decree of declaration that the above referred property is the property owned by the Trust and the permanent injunction consequent upon the declaration is also claimed in the plaint.

4. The suit was resisted by all the Defendants. On the basis of rival pleadings, the learned single Judge framed nine issues. The issues framed by the learned single Judge read as under:-

ISSUES

1. Whether the Plaintiffs prove that the suit property belongs to the Trust dated 1-4-1951 settled by late Kanhaiyalal J. Poddar?

2. Whether the Plaintiffs prove that Defendants Nos.4 and 5 are not co-lessees of the suit property in respect of the lease deed to the contrary?

3. Whether Defendants Nos.1 to 3 are liable to render accounts of the amounts collected by them from the suit property?

4. What order and decree against Defendants Nos. 1 to 3?

5. Whether the suit is barred by law of limitation as alleged in para 2 of the written statement of Defendant No.4?

6. Whether the plaint is liable to be rejected as alleged in para 1 of the written statement of Defendant No.4?

7. Whether the suit is barred by res-judicata or principles analogous thereto as alleged in para 2 of the written statement of Defendant No.4?

8. Whether the suit is bad for non joinder or misjoinder or parties or for multifariousness as alleged in para 2 of the written statement of Defendant No.4?

9. What order and decree against Defendants Nos.4 to 5?

By order dated 6-2-2001 while framing the issues, the learned single Judge directed that out of nine issues framed by him, issues Nos.5,6,7 and 8 would be treated as preliminary issues. Relevant portion of the order reads as under:

> Issues Nos.5,6,7 and 8 are to be treated as preliminary issues. Parties to file affidavits of documents and exchange inspection before next date.

For hearing preliminary issues suit is fixed on 13-2-2001.

The learned single Judge pursuant to his order dated 6-2-2001 decided the preliminary issues by his order dated 30th March, 2001. The learned single Judge answered Issue No.5 in the affirmative and held that the suit is barred by the law of limitation. The learned single Judge answered issue No.6 in the negative and held that the plaint is not liable to be rejected. The learned single Judge has answered Issue No.7 also in the negative and held that the suit is not barred by the principle of res-judicata. The learned single Judge answered Issue No.8 in the affirmative and held that the suit is bad for non-joinder of necessary parties. The learned single Judge also framed Issue No.8A and answered the same in the negative holding that the suit is not barred in view of the provisions of Section 293 of the Income-tax Act. In view of the answers given in relation to issue Nos.5 & 8, the learned single Judge held that the suit is liable to be dismissed and dismissed the suit. The learned single Judge, thus, found that the suit is barred by the law of limitation and is also liable to be dismissed for

non-joinder of necessary parties. The present Appeal is directed against this order of the learned single Judge.

5. The learned Counsel appearing for the Appellants submits that the learned single Judge has dismissed the suit by trying the issue of limitation as a preliminary issue. The learned Counsel submits that the issue of limitation is never an issue of pure question of law, it is a mixed question of law and fact and therefore, the learned single Judge had no jurisdiction to try that issue as a preliminary issue in view of the provisions of Order XIV Rule 2 of the Civil Procedure Code. The learned Counsel relies on a judgment of the Supreme Court in the case of Ramesh B. Desai & ors. v/s. Bipin Vadilal Mehta & ors., 2006(6) All MR (S.C.) 56. The learned Counsel further submits that the learned single Judge has decided the issue of limitation as a preliminary issue without requiring the parties to lead any oral evidence. According to the learned Counsel following such course of action was not open to the learned single Judge, even if it is assumed that the parties declined to lead oral evidence in view of the judgment of the Supreme Court in the case of

Gunwantbhai Mulchand Shah v/s. Anton Elis Farel, AIR 2006 SC 1556. The learned Counsel further submits that the Plaintiffs also desire to amend their plaint. They have submitted an application for amendment in the plaint. The learned Counsel submits that this court should permit the Plaintiffs to amend the pleadings. The learned Counsel further submits that the finding recorded by the learned single Judge on issue No.8 that the suit is bad for non-joinder of necessary parties also suffers from non-application of mind. The learned single Judge has held that the suit is bad for non-joinder of necessary parties, because according to him all trustees have not been joined as parties. The learned Counsel submits that this finding is contrary to the record.

6. The learned Counsel appearing for the Defendant No.4 submits that the learned single Judge tried only the preliminary issue with the consent of the parties and therefore the Appellants cannot take exception to the order of the learned single Judge directing the trial of certain issues as preliminary issues. It is submitted that the Plaintiffs themselves declined to lead any oral evidence in support of their case and therefore, the learned single Judge was justified in

deciding the issue of limitation as a preliminary issue. The learned Counsel submits that perusal of the plaint itself shows that the suit is clearly barred by the law of limitation. The learned Counsel also opposed the application made for amendment in the plaint. He submits that according to amended provisions of Order VI Rule 17 of CPC, an application for amendment in the plaint, after the trial has commenced, can be allowed only in one contingency namely that the facts which are to be brought on record by amendment were not within the knowledge of the Plaintiffs even after due diligence.

7. The learned Counsel appearing for the Defendant No.5, on the other hand, submits that the plaint does not disclose the date on which the cause of action arose. For that purpose he relies on the provisions of Order VII Rule 1. According to the learned Counsel, the learned single Judge was perfectly justified in dismissing the suit as barred by law of limitation. According to him, in any case, the suit is liable to be dismissed, because it does not disclose as to when the cause of action accrued to the Plaintiffs. The learned Counsel also read from the judgment of the learned single Judge to show that

it was the case of the Plaintiffs themselves that the suit is not really for a decree of declaration, but only for lifting of attachment levied by Defendants Nos.1, 2 & 3.

8. Now, first taking up the finding recorded by the learned single Judge on Issue No.8 for consideration, the learned single Judge has held that the suit for protection of the trust property has to be filed by all the trustees of the Trust. The learned single Judge also observed that it was not disputed before him that when the suit is filed on behalf of the Trust, all the trustees must be joined as parties. The learned single Judge says that in the plaint, however, there is no statement made that all the trustees have been joined as parties to the suit and therefore, according to him the suit is bad for non-joinder of necessary parties.

9. Reading of Issue No.8 which has been decided by the learned single Judge by holding that the suit is bad for non-joinder of necessary parties shows that the issue was framed on the basis of statement made in paragraph 2 of the Written statement of the Defendant No.4. Perusal of paragraph 2 of the

written statement of Defendant No.4 shows that only relevant averment is to be found in paragraph 2(c). It reads as under:-

> That the suit is bad for non-joinder of necessary or proper parties in as much as all the beneficiaries under the Deed of Trust are not made parties to the suit. The Trustees representing the deity installed in the family temple at Mathura are not made parties to the suit. The said deity is 1/4th beneficiary under the said Trust. Annexed hereto and marked Exhibit "1" is a list of the trustees representing the deity.

Perusal of this paragraph shows that it is not the objection that all the trustees of the Trust for whose benefit decree of declaration is claimed are not joined as parties to the suit. The allegation is that all the beneficiaries under the deed of Trust are not joined as parties to the suit. It is further claimed that the deity installed in the temple at Mathura is one of the beneficiary and that the deity is represented by trustees whose names are given in Exhibit "1" to the written statement. Thus, it is

not the objection raised by Defendant No.4 that all trustees of the Trust for whose benefits the decree of declaration is sought are not joined as parties. Therefore, the answer given by the learned single Judge in paragraph 15 to issue No.8 is totally irrelevant because that was not the objection raised by the Defendant No.4 and that was not the issue. The objection of the Defendant No.4 was that beneficiaries should have been joined as parties and that objection as is clear from paragraph 15 of the judgment has not been decided by the learned single Judge. Thus, answer given to issue No.8 suffers from non-application of mind, and therefore is liable to be set aside.

10. Now, so far as answer given to Issue No.5 is concerned, Issue No.5 was framed on the basis of allegations contained in paragraph 2 of the Written statement of the Defendant No.4. Perusal of paragraph 2 of the written statement of Defendant No.4 shows that it is paragraph 2(a) which is relevant. It reads as under:-

> (a) That the suit is barred by the law of limitation as it is filed beyond the period

prescribed by law of limitation as the-

(i) reliefs against this Defendant and his wife for permanent injunction from claiming as tenants in common under the Indenture of lease is time barred, in as much as this Defendant claimed as tenant-in-common way back in 1982. Similarly the relief for permanent injunction against this Defendant to claim the property as owner is also time barred as he had claimed the property as the owner way back in 1969 which this Defendant subsequently gave up;

(ii) The monetary claim against this Defendant is also time barred, for which the period of limitation is 3 years.

11. The objection of the Defendant No.4 thus was that the suit in so far as it claims permanent injunction against Defendants Nos.4 & 5 is barred by the law of limitation, as Defendant No.4 claimed to be the tenant in common wayback in 1982. It is further claimed that suit for permanent injunction against the Defendant No.4 to claim the property as owner is time barred as he had claimed the property

as owner way back in 1969. But that stand was subsequently given up. It was also claimed that the monetary claim is also barred by the law of limitation.

12. Now, at this juncture, if one peruses the prayer clauses of the suit, it shows firstly that there is no monetary claim made against Defendant No.4. Therefore, there is no question of any monetary claim made against the Defendant No.4 being barred by the law of limitation. In the plaint following reliefs are claimed:

(a) That this Hon'ble Court may be pleased to declare that the suit property being plot No.6, Worli Estate Scheme No.52, Abdul Gaffar Khan Road, Worli Sea Face, Bombay with the building constructed thereon and more particularly described in Schedule Exhibit-"A" hereto belongs to the trust declared under the Declaration of Trust dated 1st April 1951 made by Kanhaiyalal J. Poddar.

(b) That the defendants Nos.1 and 2 be

decreed and ordered to pay to the plaintiffs Rs.2.25 lacs as per particulars of claim Exhibit "A-1" hereto annexed together with interest @ 24% p.a. on the annual collections from 1st day of January of every succeeding year till 31st December, 1996.

(c) That the defendants Nos. 1 to 3 be directed to disclose the amounts collected by them and a decree for the total amount together with interests at the rate of @ 24% p.a. on the amount and on the collections from 1st day of January of every succeeding year till 31st December, 1996 be passed.

(d) That the defendants Nos. 1 to 3 by themselves their servants and agents be restrained by an order of permanent injunction of this Hon’ble Court from asserting any title adverse to the said Trust to the said property or initiating or continuing any assessment proceedings on the footing that the said property

belongs to the estate of Ramniwas K. Poddar or from recovering any taxes, duties or dues of Ramniwas K. Poddar or his estate from the said property.

(e) That the defendant No.4 and 5 by themselves their servants and agents be restrained by an order of permanent injunction of this Hon'ble Court from claiming as tenants in common of the said property or the land and building comprised therein or any part thereof.

(f) That the Defendant No.4 be restrained by an Order of permanent injunction of this Hon'ble Court from claiming any part of the property to be belonging to him as owner thereof.

13. So far as relief of permanent injunction is concerned, by prayer clause (e) permanent injunction is claimed against Defendants Nos.4 & 5 restraining them from claiming to be the tenant in common of the suit property and by prayer clause (f) a permanent

injunction is claimed against Defendant No.4 restraining him from claiming to be the owner of any part of the property. From the statement made in paragraph 2(a) of the written statement of Defendant No.4, it is clear that though the Defendant No.4 was claiming that relief claim by prayer clause (f) against him is barred by law of limitation, because he had claimed to be the owner of the property in 1969, but at the same time he stated that subsequently he has given up that plea. Therefore, it will be safe to deduce from this that so far as prayer clause (f) is concerned, Defendant No.4 was not claiming that it is barred by the law of limitation. So far as relief claimed by prayer clause (e) is concerned, the case of Defendant No.4 was that he had claimed to be tenant in common in 1982 and therefore the suit filed in the year 1997 was barred by the law of limitation. Perusal of prayer clause of the plaint shows that the Plaintiffs were also claiming by prayer clause (a) a decree of declaration that the Trust is the owner of the property. So far as that prayer is concerned, the Defendant No.4 was not claiming that the relief for a decree of declaration is barred by law of limitation. Thus, the case of the Defendant No.4 was that only

relief claimed by prayer clause (e) for permanent injunction is barred by the law of limitation because he has claimed to be the tenant in common in 1982. Issue No.5 has been framed because of averments made in the written statement of the Defendant No.4 and it is clear from those averments that the Defendant No.4 is claiming that only the relief claimed by the prayer clause (e) is barred by the law of limitation and not the entire suit, but on the basis of the finding recorded on this issue the learned single Judge has held that the entire suit is barred by the law of limitation. The issue No.5 framed on the basis of these pleadings cannot be said to be purely an issue of law, at best it can be said that it is a mixed issue of fact and law. Perusal of the order dated 6-2-2001 passed by the learned single Judge shows that it is by that order that the learned single Judge framed the issues and at the same time directed that he will treat issues Nos.5, 6, 7 & 8 as preliminary issues. Thus, it is by order dated 6-2-2001 that the learned single Judge directed trial of issue No.5 as a preliminary issue and decided it by order dated 30th March, 2001. At this juncture, in view of the submissions made by the parties it becomes necessary to look at the provisions of Order

XIV Rule 2 of CPC, which have been considered by the Supreme Court in its judgment in the case of Ramesh B. Desai. Rule 2 of Order XIV reads as under:-

> Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.
>
> (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-
>
> (a)the jurisdiction of the Court, or
>
> (b) a bar to the suit created by any law for the time being in force,
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> and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with

the decision on that issues.

14. Perusal of the above provisions shows that it lays down that where issues of both of law and of fact arise in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force. The above quoted provisions has been considered by the Supreme Court in its judgment in the case of Ramesh B. Desai (supra). The observations of the Supreme Court found in paragraph 12 of that judgment are relevant. They read as under:-

> 12. Sub-rule (2) of Order XIV, Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the

time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S.Khanna Vs. Brig.F.J.Dillon, AIR 1964 SC 497, and it was held as under:-

> "Under O.14 R.2 where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all

> the issues in a suit should be tried by the Court, not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

Though there has been a slight amendment in the language of Order XIV Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

15. Perusal of above quoted observations of the Supreme Court shows that the Supreme Court has in categorical terms held that the Civil Procedure Code does not confer jurisdiction on the court to try a mixed issue of law and fact as a preliminary issue.

The issue which has been tried as a preliminary issue in this case is the issue No.5 and by no stretch of imagination it can be termed as an issue of law only and therefore, in terms of the judgment of the Supreme Court, the learned single Judge had no jurisdiction to try that issue as a preliminary issue. The learned Counsel appearing for the Defendant No.4 submitted that the learned single Judge tried issue No.5 as a preliminary issue because the parties consented for the same. In my opinion, this submission has no substance, because according to the judgment of the Supreme Court referred to above in the case of Ramesh B. Desai, the court does not have jurisdiction to try an issue involving mixed question of fact and law as a preliminary issue and it is a settled law that by consent of parties jurisdiction cannot be conferred on the court. It is only Statute which confers jurisdiction on the court, and therefore, even assuming that both parties consented to the trial of issue No.5 as a preliminary issue, in view of the judgment of the Supreme Court in the case of Ramesh B. Desai still the court will not have any jurisdiction to try that issue as a preliminary issue, and therefore, for this reason alone the finding recorded by the learned single

Judge on issue No.5 is liable to be set aside as the finding recorded without the court having jurisdiction to do so.

16. There was another objection raised to the judgment in relation to issue No.5. It was submitted relying on the judgment of the Supreme Court in the case of Gunwantbhai Mulchand Shah (supra) that as an issue of limitation was being tried as a preliminary issue, the court should have insisted on the parties to lead oral evidence and the court was not justified in deciding that issue without the parties leading oral evidence. Following observations from paragraph 7 of that judgment were relied on.

> "In a case of that nature normally the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the

> trial court should have insisted on the parties leading evidence, on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial."

17. It was submitted on behalf of the Defendants that these observations have been made by the Supreme Court in the peculiar facts of that case and they are not of general application. It was also submitted that the learned single Judge has clearly recorded in paragraph 2 of his judgment that the advocates appearing for both sides stated that decision on preliminary issue does not require any oral evidence, in the submission of the learned Counsel therefore, there was no method by which the learned single Judge could have insisted on the parties to lead oral evidence. The submission made on behalf of the Defendant No.4 no doubt appears to be attractive, but perusal of the observations of the Supreme Court quoted above shows that in the case before the Supreme Court also statement was made on behalf of the Plaintiffs that the Plaintiffs do not want to lead any evidence. The Defendants also took the same

stand. Still the Supreme Court has observed that the court should have insisted on the parties to lead evidence. In our opinion, however, in view of what we have observed above it is not necessary for us to express any final opinion on this aspect of the matter, because we find that as the issue of limitation was a mixed question of law and fact, the court had no jurisdiction to try that issue as a preliminary, in view of the judgment of the Supreme Court in the case of Ramesh B. Desai (supra).

18. Perusal of the judgment of the learned single Judge shows that he has held that because the Defendants Nos.4 & 5, had in categorical terms in the affidavit dated 13-4-1982, stated that they have accepted the lease deed, the suit is barred by the law of limitation. These observations of the learned single Judge are obviously in relation to the reliefs claimed by prayer clause (e) and it is only on this basis that the learned single Judge holds that the entire suit is liable to be dismissed as barred by the law of limitation. The learned single Judge does not consider that so far as relief claimed by prayer clause (f) is concerned, according to Defendant No.4 himself he had given up his stand that he is the

owner of the property, and therefore, the bar of limitation in relation to relief claimed by prayer clause (f) may not apply. Similarly, the learned single Judge has also not considered that it was not even the claim of the Defendant No.4 that the relief of decree of declaration claimed by prayer clause (a) was barred by the law of limitation. Now, so far as the relief claimed by prayer clause (e) is concerned, we find that the learned single Judge did not consider what is stated in paragraph 16(h) of the plaint. Paragraph 16(h) of the plaint reads as under:-

> (h) The Defendant No.4 thereafter filed a suit No.1809 of 1982 in this Hon'ble Court for claiming his share in income and property as beneficiary under the said trust although he could claim share in income if at all and in the alternative he claimed his share in the said property as one of the tenants-in-common under the said Indenture of Lease dated 19th February, 1964. The Plaintiffs state that this after though of defendants No.4 & 5 to claim the said property as Tenants-in-common is wholly malafide and without any substance.

> The Plaintiffs state that the Defendants No.4 & 5 are in the events that have happened bound by the provisions of the said trust. The Plaintiffs further submit that the Defendants No.4 & 5 have not acquired under the said Deed of Lease any independent right in as much as admittedly they have paid no consideration for acquiring the lease hold rights under the said Deed of Lease and the said document qua them is unregistered and confers no rights unto them.

It is clear from the above quoted paragraph that according to the Plaintiffs, Defendant No.4 has filed civil suit No.1809 of 1982 in this court and he was claiming his share in the property of the trust as the beneficiary of the Trust. Now, in the written statement the Defendant No.4 has not specifically dealt with the allegations made in paragraph 16(h). So far as suit No.1809 of 1982 is concerned, that appears to have been withdrawn by Defendant No.4 on 6-11-2000. In our opinion, the averments made by Defendant No.4 in Suit No.1809 of 1982 were relevant and the fact that the suit continued to be pending even during the pendency of the present suit was

relevant and ought to have been considered by the learned single Judge, but as we find that the learned single Judge was not justified in trying the issue of limitation as a preliminary issue, and therefore consequently we will have to remit the suit back, we do not propose to express any final opinion on this aspect of the matter.

19. One more aspect which is relevant, in our opinion, to be considered is that the Plaintiffs have stated that they want to lead oral evidence on the issue of limitation also. A statement to that effect has clearly been made before us. The Plaintiffs have also filed an affidavit before us seeking leave of the court to amendment the plaint to place on record the statements made by Defendant No.4 from time to time in relation to his status vis-a-vis the suit property. According to the Plaintiffs, these statements are relevant for deciding the issue of limitation, because according to the Plaintiffs from time to time the Defendant No.4 has been changing his stand in relation to his status.

20. We have already noted above the statement made by the learned Counsel for the Plaintiffs that the

Plaintiff want to delete all the prayers against the Defendants Nos.1, 2 & 3 as also allegations made in the plaint against the Defendants Nos.1, 2 & 3. Therefore, now basically the Plaintiffs are claiming a decree of declaration as to the ownership of the suit property and relief of permanent injunction against the Defendants No.4 and 5 also in relation to the suit property. No fresh relief is being included by the amendment. Only additional grounds are being raised in support of the plea raised in the plaint. Proviso to Rule 17 Order VI, in our opinion, will not come in our way in granting this amendment, because the trial of the suit will begin after the learned single Judge takes up the suit for hearing on remand.

21. In our opinion, therefore, it will be appropriate to permit the Plaintiffs to amend the plaint. We are making it clear that we have not gone into merits of the averments made by the amendment. Those averments, which are being made by amendments, can be contested by amending written statement or by filing additional written statement by the Defendants.

22. As we have found that the judgment impugned in

the petition is liable to be set aside, because the learned single Judge was not justified in deciding the issue of limitation as a preliminary issue, the appropriate course of action to be followed would be to remand the proceedings back to the trial court for trial of all the issues together after permitting the parties to lead evidence, both oral and documentary. As we are remanding the proceedings back, in our opinion, it will be appropriate to permit the Plaintiffs to amend the plaint also in terms of the affidavit filed seeking amendments in the plaint.

23. In our opinion, therefore, following order would meet the ends of justice.

O R D E R

(i) The judgment and decree impugned in the Appeal are set aside.

(ii) Suit No.3433 of 1997 is remitted back with a request to the learned single Judge to try all the issues together, after permitting both sides to lead oral and documentary evidence.

(iii) The Plaintiffs are permitted to delete the names of Defendants Nos.1, 2 & 3 and all allegations made against the Defendants Nos.1, 2 & 3 from the plaint. The Plaintiffs are also permitted to amend their plaint in terms of the affidavit of Mr.Ajay Sohanlal Jhuria dated 17th October, 2007, which is taken on record and marked "X" for identification.

(iv) Amendments in the plaint to be carried out within a period of eight weeks from today.

(v) Defendants Nos.4 & 5 shall be at liberty to file reply to the amended plaint either by amending their written statement or by filing additional written statement.

(vi) Appeal disposed of. No order as to costs.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)